IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

IN THE MATTER OF JACOB YUNGBLUTH and AUGUST W. SCHAFER, co-partners doing business under the firm name and style of Bank of Hamilton, Jacob Yungbluth & Co. Proprietors, and Bank of Hamilton, A. W. Schafer & Company, Proprietors; and A. W. Schafer & Company, Private Bank; Jacob Yungbluth and A. W. Schafer,

Bankrupts.

No. 2418

BRIEF OF APPELLEES

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STATEMENT.

The appellant in the opening statement of his brief has attempted to limit the questions involved on this appeal, to two; but both are summed up in the

second question as presented by him since it is a mere repetition of the second assignment of error set forth in the transcript of record herein.

It is the contention of the appellees that the question might more fairly be stated:

> Can a bankrupt, who has been adjudged as such because of his membership in a co-partnership which has become insolvent, claim property as exempt, as against creditors of the co-partnership, which property has been purchased with co-partnership moneys, or moneys withdrawn from the co-partnership for that purpose, at a time when the co-partnership was insolvent?

As indicated in appellant's brief, the appellant herein was adjudged bankrupt by the District Court, which adjudication was sustained upon appeal by this Court, because of the fact that he was a member of a co-partnership conducting the Bank of Hamilton.

So far as this Court had to do with that proceeding its decision will be found in 185 Federal, 773. The last paragraph of that decision is as follows:—

> "Upon the issue of insolvency the appellant's defense was submitted to a jury and the fact that his individual assets exceeded his individual debts could not relieve him of the charge of insolvency as a member of the partnership, *for the total assets of the partners and of the*

firm were insufficient to pay the partnership debts.''

The italics in the above quotation are our own for purposes of emphasis.

In fact all of the debts proven in the above proceeding were debts of the co-partnership and the individual property of the bankrupt Yungbluth was taken over by the trustee, only because of its liability for the payment of these partnership debts.

We do not agree with counsel for appelant that the effect of the holding in the case last above referred to was, as indicated by appellant in his brief, "that appellant had sold out his interest in the bank on January 25th, 1905, but this Court held the sale was so silently conducted as to be a mere makeshift and so did not relieve appellant from his responsibility.'' A reference to the opinion and decision of this Court in that case, will, we think, clearly disclose that the finding and judgment of the District Court and this Court on that question was, that the partnership which conducted the Bank of Hamilton, had never dissolved prior to the proceedings in bankruptcy herein, and that being the case, there could

have been no *"selling out"* by the appellant Yungbluth in 1905.

Therefore, while the partnership existed and was in full force, in June of 1905, the appellant purchased the property in question, which he thereafter used and occupied, and which he now claims as exempt as a homestead under the exemption laws of the State of Washington.

It was, and is, the contention of the objectors to the setting aside of said homestead as exempt, which objectors are the appellees herein, that the property in question was purchased with funds of the co-partnership, and not with the individual funds of the bankrupt Yungbluth, and was therefore co-partnership assets, held in trust for the partnership and its creditors by the appellant Yungbluth, and therefore not subject to a claim of exemption by him as an individual.

A reference to the transcript of records herein will disclose that the books of the bank were burned on January 9th, 1909, a little more than a year after they had been taken possession of by a receiver appointed by the State Court of the State of Washington, and prior to the final adjudication herein,

(Transcript of Record, p. 3) and it was therefore very difficult to obtain the facts relative to the purchase of the property in question here.

However, it does appear that on or about January 19, 1905, much juggling of the accounts of the bank was had by the co-partners, the ultimate result of which was the changing of an overdraft of the appellant herein, Yungbluth, of $1633.67 on the books of the bank, to a credit balance of $950.00 (Transcript of Record, pp. 4 and 5), and that when the appellant Yungbluth purchased the property in question, he applied $600.00 of this balance on the purchase price and ostensibly borrowed $600.00 more from the bank, which constituted the entire purchase price of the property with the exception of $100.00, which he had previously paid as "earnest money." (Transcript of Record, pp. 4 and 5). This was on June 10th, 1905, and twelve days later the note representing the $600.00 borrowed, was paid by a check or draft from the First National Bank of Mt. Vernon (Transcript of Record, p. 6).

This payment was made as nearly as we can gather from the somewhat uncertain testimony of the appellant as a result of the appellant having given the

Mt. Vernon bank his note for that amount. (Transcript of Record, pp. 8 and 9); but thereafter, in 1907, the Bank of Hamilton paid the Mt. Vernon bank, $500.00 of this amount, and the appellant gave his note to the Bank of Hamilton for that amount, which note passed into the hands of the receiver appointed by the State Court for the Bank of Hamilton, and ultimately into the hands of the trustee in bankruptcy herein, who now holds it. This fact is undisputed and is admitted by the appellant herein (Transcript of Record, p. 9).

It was this $500.00 which the referee found was borrowed by the appellant from the Bank of Hamilton, and constituted a part of the investment in the homestead claimed by the appellant, and was and constituted a fraud against the creditors of the bank; and the referee concluded and ordered that the homestead should be charged with the amount due on said note including interest (Transcript of Record, pp. 2 and 3). And this order of the referee was confirmed by order of the District Court for the Western District of Washington, Northern Division, under the jurisdiction of which Court said Referee was acting, on the 2nd day of April, 1914 (Transcript of Record, p. 11).

ARGUMENT.

Upon the foregoing facts, all of which appellees insist are sustained by the record, it seems clear that the referee might in justice have found that the entire property claimed by the appellant herein as exempt, was property of the co-partnership, purchased with partnership assets, but in view of the uncertainty of the testimony as submitted to him, he only found that the $500.00 originally taken from the Bank of Hamilton, repaid to it by the Mt. Vernon bank, and again repaid to the Mt. Vernon bank by the Bank of Hamilton, was partnership money, and to that extent the partnership was an owner in the property claimed by Yungbluth as an individual, as exempt.

We know of no law in the State of Washington or elsewhere, which authorizes an individual member of a co-partnership to claim as exempt from liability of the co-partnership, and for his own use and benefit, properties or moneys of the co-partnership.

The question of the jurisdiction of the Court over exempt property of the bankrupt, is not involved, since, as above shown, the property in question,

at least to the extent which the referee found, was not the property of the individual bankrupt, and while it is true that the trustee in pursuance of Clause II, Section 47, of the Bankrupt Act, formally set over to the appellant herein the property claimed by him as exempt, upon the objection of creditors it was found by the Court that the same was not in fact his property, but belonged to the co-partnership and was liable for the payment of the partnership debts.

Appellant has argued in his brief, that even where a bankrupt in contemplation of bankruptcy, takes property not exempt and converts it into exempt property, the courts cannot reach it, but we do not concede that this rule should be extended to the extent that a co-partner may withdraw partnership assets and invest them in property, taking the title in his own name, and then claim the same as exempt as against creditors of the co-partnership. We think, as expressed by the District Court in this case, that the facts show a fraud practiced by the appellant upon the creditors of the bank, and that he is seeking to reap the benefit of this fraud through the round about method of a claim of exemption, and that while

it is true that fraud must be proven and not presumed, it is also true that a bankrupt claiming a homestead takes the burden of proof in establishing his right to the homestead, and that the right of the bankrupt to take the homestead free from the claim allowed by the referee and District Court herein, depended upon whether at the time the money was withdrawn from the partnership and invested in the homestead, the partnership was solvent or insolvent.

The close proximity of the time within which the money was so withdrawn from the bank to the date upon which it was declared insolvent, certainly raises a presumption that it was insolvent at the time the moneys were withdrawn, and the burden of establishing its solvency at the time of the withdrawal of such money, was upon the appellant, and this burden he has certainly not sustained as shown by the record.

Appellant argues in his brief, that he purchased this alleged homestead property in June of 1905, and that the bank did not fail until 1907, and that this therefore could not be deemed a fraud upon creditors; but the facts as above shown, are that the purchase was made with the bank funds at least to the extent of

the $500.00 found by the referee; that these funds were temporarily replaced in the bank by the appellant, but subsequently returned and repaid by the bank in 1907 shortly before the adjudication of insolvency of the bank, and therefore in fact and in contemplation of law, the funds invested were those of the bank or co-partnership.

Appellant inquires near the close of his brief,—"What are exemption laws for but as a place of refuge from the storm of creditors?" They were certainly not invented to permit a member of a co-partnership engaged in a banking business, which is at least a *quasi* trust business in its relation to the public and its creditors, to use the funds of its creditors consisting of deposits, for the purchase of private property for the benefit of himself and family, to the exclusion of those who had put their trust in, and deposited their moneys and effects with the banking partnership.

We therefore respectfully submit that the order and judgment of the referee, sustained and confirmed by the order of the District Court in the above entitled matter, should be fully affirmed by this Court, to

the end that justice in so far as it may be administered under the complex situation involved in this case, may be rendered.

Respectfully submitted,

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